[APPELLATE CRIMINAL JURISDICTION]
McELWAINE, C.J.
January 23, 1939.

REX v. SCHEFELAAR.

[SINGAPORE MAGISTRATES APPEAL No. 92 of 1938]

Bankruptcy Ordinance (Cap. 45) Section 107 (1) (m)—obtaining credit upwards of $100 without disclosing bankruptcy—principles of sentence —Criminal Procedure Code, (Cap. 21) Sections 302, 307 and 402 (6)—right of the Official Assignee to appeal against decision of District Court and to appear on hearing.

The offence of obtaining credit without disclosing bankruptcy is generally more appropriately punished with imprisonment than with fine. Where the Official Assignee, in pursuance of his statutory duty, is the complainant in a criminal case he is a party and, if dissatisfied with the decision, he has a right to appeal. *Quaere* whether he has also a right of audience at the hearing of the appeal.

The respondent, while an undischarged bankrupt, borrowed $500 from one Theng Kwee Teng without disclosing the bankruptcy and one Tipaldo joined in the transaction as a guarantor. On the prosecution of the Official Assignee the respondent was convicted in the District Court and sentenced to pay a fine of $100. The Official Assignee appealed to the High Court against the sentence on the ground that it was inadequate and unsuitable.

E. N. Taylor (Official Assignee) for the Crown.

Morrison for the respondent.

Cur. Adv. Vult.

McELWAINE, C.J.—The respondent was charged before the District Judge at Singapore with having on the 7th December 1937 at Singapore, being an undischarged bankrupt, obtained credit for $100 or upwards by borrowing $500 from Theng Kwee Teng without informing him that he (the respondent) was an undischarged bankrupt.

The act charged constitutes an offence against section 107 (1) (m) of the Bankruptcy Ordinance.

The respondent was convicted and sentenced to pay a fine of $100 or three months simple imprisonment.

The Official Assignee appeals against the sentence as inadequate.

On the hearing of the appeal Mr. Morrison for the respondent objected that the Official Assignee had no right either to appeal or to appear.

As the Official Assignee laid the information or complaint in accordance with his duty under section 113 of the Bankruptcy Ordinance he is a person dissatisfied with a sentence pronounced by a District Court in a criminal case to which he was a party and he is given by section 302 of the Criminal Procedure Code a right of appealing against the sentence.

Section 307 of the Criminal Procedure Code enacts that when the appeal comes on for hearing the appellant shall be first heard and the Official Assignee being the appellant contended that he had a right to be heard.

Mr. Morrison drew attention to section 402 (6) "No person shall appear on behalf of the Crown in any criminal appeal other than the public prosecutor, the Solicitor-General or by a deputy appointed under subsection (3) or by an advocate authorised under subsection (4)."

I think the Crown must be regarded as the prosecutor in this case, and I intimated that I would not decide on what looks like a conflict between section 307 and section 402 (6) without giving the Attorney-General a right to be heard. That the difficulty was appreciated became evident when Mr. E. N. Taylor, the Official Assignee, produced an authorisation from the Public Prosecutor "to appear on behalf of the Crown in the above-mentioned criminal appeal in which Hendrik Jan Schefelaar is the respondent."

Without deciding whether the Official Assignee had a right to be heard by virtue of section 307 I heard him as an advocate authorised under section 402 (6).

The Official Assignee argued that the District Judge in his grounds for sentence had taken matters into consideration which he should not have taken into consideration or that he had attached undue importance to certain matters in the respondent's favour.

With two exceptions I do not think any of these matters was improperly considered.

It is true that section 107 (1) (m) imposes an absolute prohibition against obtaining the credit which this bankrupt obtained, but the Legislature has given a wide discretion to the Court as to the penalty to be imposed for infraction of the prohibition. An undischarged bankrupt who obtains credit for upwards of $100 without informing the creditor that he is an undischarged bankrupt "shall be punished with imprisonment, which may extend to two years, or with fine or with both."

If all offences against this section were equally heinous a minimum sentence might be prescribed.

I see nothing wrong in principle in the District Judge taking into consideration the extent of the bankruptcy or the chance of borrowed money being repaid, but after taking all these into consideration a fine of $100 for criminally obtaining $500 is inadequate.

The first exception to which I have referred is the closing portion of the grounds for sentence "With regard to the option of a fine I took the view that, since the law allows of this punishment and since a bankrupt is not denied all means of

raising money, the option should not be refused, in an appropriate case."

A bankrupt is not denied all means of raising money but he is denied the means of raising money, by obtaining credit unless he fulfils a vital condition by disclosing to the lender the fact that he is an undischarged bankrupt, and this condition the present respondent did not fulfil.

I have intimated before that in my view the offence of which the respondent has been convicted is more appropriately punished with imprisonment than with fine.

On adjudication the respondent's property vested in the Official Assignee and this applies to property acquired after the adjudication and prior to discharge. He is allowed the necessary expenses of maintenance of himself and his family and although a small fine might be paid out of such alimentary allowance, it is improbable that the bankrupt would have such a margin as would allow of a heavy fine being paid.

The fine may therefore be expected to be paid by some one else or be derived from funds which should be available for creditors.

I therefore think that it should be only in very exceptional cases that the sentence should be a fine rather than imprisonment.

The second point in the grounds of sentence to which exception can be taken was that Theng Kwee Teng knew that if the accused's interests proved valueless, his main chance of obtaining repayment was from the guarantor. This only shews that Theng Kwee Teng did not regard the loan as a safe one. The security was in fact worse than he supposed and such security as he has got in the guarantor he got through the respondent inducing Tipaldo to go surety without informing him that he (the respondent) was an undischarged bankrupt. The offence was committed notwithstanding the security. *Fryer*, 7 Cr. App. R., 183.

These circumstances do not appear to me to lessen the guilt of the respondent.

Mr. Morrison said that the conviction carries with it a further penalty. By section 33(4) the Court cannot now grant the respondent his discharge. If this is an additional penalty it is one imposed by the Ordinance and it makes no difference that the punishment for an offence is contained in two sections instead of in one. The punishments are cumulative not alternate.

I think a fine of $100 for criminally obtaining $500 is an inadequate sentence even after taking into consideration all that can be said in mitigation.

In *Abdul Rahman* v. *Public Prosecutor of Johore* 7 M.L.J., 219 the Court of Appeal in Johore said "we will be following the more modern practice if, in suitable cases, we reduce or enhance sentences when, having before us all the material which the trial Judge had before him, we consider, having regard to all the circumstances of the case, that the sentence imposed is manifestly excessive or inadequate.'

This $500 is lost whether the loss falls on the lender or on the surety and that loss is occasioned by the respondent's offence. A fine of $100 leaves him with a handsome profit.

I think the fine manifestly inadequate.

I set it aside and sentence the respondent to one month simple imprisonment. The fine, if it has been paid is to be repaid.

As I consider I am enhancing the sentence I have leaned heavily towards moderation. It must not be understood that one months's imprisonment is to be regarded as a standard punishment for this offence.

[APPELLATE CRIMINAL JURISDICTION]

McELWAINE, C.J. TERRELL, Ag. C.J. (F.M.S.) & HORNE, J.

February 15, 1939.

REX v. LEE HOEY.

[SINGAPORE MAGISTRATE'S APPEAL No. 11 of 1939]

Chandu Revenue Ordinance (Cap. 223, s. 11, sub-s. 3 (b)—Possession of non-Government Chandu.

Section 11, sub-s. 3(b) of the Chandu Revenue Ordinance contains no such word as "knowingly" and provides no defence for a person infringing it. If an accused knows that he is in possession of Chandu and takes the risk of it being (and in fact it is) non-Government chandu he is guilty of an offence against the section. A bona fide but mistaken belief that chandu dross was the dross of Government chandu is a matter which the Court can take into consideration in assessing punishment.

MAGISTRATE'S APPEAL.

The accused in person.

Butterfield for the Crown.

Cur. Adv. Vult.

McELWAINE, C.J.—This is an appeal by the Crown from an acquittal. The matter first came before me as a special case stated under section 317 of the Criminal Procedure Code by L. B. Gibson Esq., District Judge at Singapore, but as it was intimated that the Crown desired me to overrule a decision of Howes J. I considered that the case should be heard by a Court of three Judges and that as there is some question as to whether a special case can be heard by three Judges, I gave leave to the Crown to bring an ordinary appeal out of time so the appeal came on before a Court of three Judges under section 306 (3) of the Criminal Procedure Code.

The respondent was charged that he, on the afternoon of the 11th day of October, 1938, did